

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1930,
February 11.

KOMALANGI AMMAL (MINOR) BY HER FATHER AND
GUARDIAN KANDASAMI CHETTIAR (FIRST DEFENDANT),
APPELLANT,

v.

M. K. SOWBHAGIAMMAL AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Will—Caveat—Nature of interest entitling a person to lodge—
Person setting up title adverse to testator—Whether can be
said to have an interest in the estate of deceased.*

The interest which entitles a person to lodge a caveat in an application for the probate of a will must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate.

A person, who alleges that jewels which the testator has disposed of by his will are her own jewels, and thus sets up a title adverse to that of the testator, cannot be said to have an interest in the estate of the deceased.

ON APPEAL from the judgment and decree of VENKATASUBBA RAO J. dated the 16th, 17th, 18th and 24th days of January 1928 and passed in the exercise of the Original Testamentary Jurisdiction of the High Court in Testamentary Original Suit No. 13 of 1927 (Original Petition No. 198 of 1927).

The facts necessary for this report are :

One Mangadu Ellappa Chetti died leaving considerable assets. He was said to have left a will and an application for probate of that will was taken out by M. K. Sowbhagiammal and K. Thangavelu Chetti, executrix and executor respectively under the aforesaid will. A caveat was filed by Komalangi Ammal, the wife of

* Original Side Appeal No. 27 of 1928.

Gopala Chetti, the minor grandson of the testator, mainly on the ground that the testator purported to dispose of by the will her stridhanam jewels, as if they belonged to himself, and that his will in regard to them was inoperative. VENKATASUBBA RAO J. dismissed the caveat holding that the caveator was not possessed of any interest entitling her to oppose the grant of probate; and, after taking evidence in the matter, directed the grant of probate to the petitioners. The caveator filed an appeal against the said orders.

B. C. Seshachala Ayyar for appellant.

V. Radhakrishnayya and *A. Kuppaswami Ayyar* for respondents.

JUDGMENT.

RAMESAM J.—Most of the decisions of all the High Courts are against the appellant. They are referred to by the learned trial Judge and need not be repeated. The learned Advocate for the appellant relies on *Hannumantha Rao v. Letchamma*(1). This case has been considered by the trial Judge. It is based on *In the matter of the Petition of Bhubosoonduri Dabee*(2), a case which has not been followed in the Calcutta High Court ever since, and certain other decisions. The decisions in *Arakal Bastian Ansap v. Narayana Ayyar*(3) and *Kishen Dai v. Satyendra Nath Dutt*(4), also referred to in it, are cases of judgment-creditors of a son of the testator. In *Arakal Bastian Ansap v. Narayana Ayyar*(3), the will was revoked and it was not necessary to rely on *In the matter of the Petition of Bhubosoonduri Dabee*(2). The decision in *Brinda Chowdhraïn v. Radhica Chowdhraïn*(5) is the case of a widow entitled to maintenance against

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(1) (1926) I.L.R. 49 Mad. 960.

(2) (1880) I.L.R. 6 Calc. 460.

(3) (1910) I.L.R. 34 Mad. 405.

(4) (1901) I.L.R. 23 Calc. 441.

(5) (1885) I.L.R. 11 Calc. 492.

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her husband's estate, the husband being the alleged testator. I do not see how *Kishen Dai v. Satyendra Nath Dutt*(1) supports the decision in *Hanumantha Rao v. Letchamma*(2). It is unnecessary for us to say whether *Hanumantha Rao v. Letchamma*(2) is correctly decided or not, and we are not to be taken as agreeing with all the observations in it.

In a case of the kind before us, all the authorities are agreed that the caveator has no interest to oppose the grant of the probate. In so far as she claims that the jewels dealt with in the will are hers, it is not an interest in the estate of the deceased according to all the authorities. Whether the will is genuine or not, her right to the jewels cannot be affected. In so far as she claims to be the wife of one of the grandsons, and can claim to be supported from the estate, her position under the will is no worse than if the will did not exist.

The case of *Kipping and Barlow v. Ash and others*(3) does not help the appellant. The appeal is dismissed with costs.

CORNISH J. CORNISH J.—I agree that the appeal should be dismissed. The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate, see *Pirojshah Bikhaji v. Pestonji Merwanji*(4) and *Kalajit Singh v. Parmesher Singh*(5). But here the caveator is alleging that the jewels which the testator has disposed of by his will are her own property. In other words, she is setting up a title adverse to the testator's title to the property. It is impossible to say that she has an interest in the deceased's estate when she is claiming that the property

(1) (1901) I.L.R. 28 Cal. 441.

(2) (1926) I.L.R. 49 Mad. 960.

(3) (1846) 1 Rob. Eccl. 270.

(4) (1910) I.L.R. 34 Bom. 459.

(5) (1917) 39 I.C. 573.

in question does not form part of the deceased's estate. It has long been settled that it is not the province of a Court of Probate to determine questions of title to property which a testator purports to dispose of by his will; the reason being that the grant of probate does no more than establish the *factum* of the will and the appointment of the executors (if any) named in the will. The grant of probate will not, therefore, prevent the appellant from bringing a suit, if she should be so advised, to recover from the executors, or any other persons in possession, the jewels which she claims as her own property.

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APPELLATE CIVIL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenvven.*

SUBBA RAO AND FIVE OTHERS (PLAINTIFFS 2 TO 7),
APPELLANTS,

1930,
March 27.

v.

MAHALAKSHMAMMA AND TWO OTHERS (DEFENDANTS 1 TO 3),
RESPONDENTS.*

*Indian Registration Act (XVI of 1908), ss. 17 and 49—
Unregistered partition list evidencing partition—Admissibility of, to prove division of particular properties or to prove division in status—Admissibility of conduct to prove division in status—Hindu Law—Custom—Illatom relationship, incidents of—Necessity for strict proof—Extent of legal rights flowing from illatom relationship, not matter of law, but matter of proof of custom.*

A document between two persons containing lists of properties that fell to the share of each on a partition, written in

* Appeal No. 116 of 1928.